

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HEIDI J. KASPERBAUER et al.,

Plaintiffs and Appellants,

v.

WILLIAM D. FAIRFIELD,

Defendant and Respondent.

2d Civ. No. B200076  
(Super. Ct. No. P078928)  
(Ventura County)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 26, 2009, be modified as follows:

Delete from page 9, first paragraph, beginning with "In addition, the Probate Code provides . . ." through page 11, first paragraph, and replace it with the following:

In addition, the common law as set forth in the Restatement Second of Trusts, section 249, Indemnity From The Beneficiary Personally, supports Fairfield's right to indemnification from the beneficiaries for expenses incurred in defending the accounting. Subdivision (2) of that section states: "If the trustee is entitled to indemnity out of the trust estate for expenses incurred in the administration of the trust and conveys the trust estate to the beneficiary without deducting the amount to which he is entitled as indemnity, he is entitled to indemnity from the beneficiary personally to the extent of the property so

conveyed, unless he manifested an intention to forego his claim to indemnity, or unless the beneficiary has so changed his position that it is inequitable to compel him to indemnify the trustee."

We have found no California case applying this provision.

However, the Legislature has directed that the common law governs except as it has been modified by statute. (§ 15002.) No California statute has modified the common law on this point and it is applicable here. As the court distributed all the assets of the Trust without making adequate provision for Fairfield's expenses of administration, the trial court properly ordered that a portion of the Trust assets be returned to provide a fund for payment of such expenses. We hasten to add, however, that appellants may seek reimbursement from Fairfield at the conclusion of the case should they prevail on their claim that Fairfield breached his fiduciary duty or that his expenditures for Trust administration were excessive.

The petition for rehearing is denied.

There is no change in the judgment.